AdvanceMe Inc v. RapidPay LLC
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EXHIBIT Y

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Defendants' Reply Regarding Their Statement of Undisputed Facts
(Response to Plaintiff's Appendix A)

In response to Defendants' Statement of Undisputed Material Facts, Plaintiff has attempted to dispute every individual statement—in some cases without citing any evidence at all, and at other times without citing evidence contrary to the statement offered. Under Local Rule CV-56(c), "the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the 'Statement of Genuine Issues' filed in opposition to the motion, as supported by proper summary judgment evidence."

> Mere conclusory allegations, unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. The party opposing summary judgment is required to identify evidence in the record and articulate the manner in which that evidence supports his claim.

Sparks v. Lowe's Home Centers, Inc., 341 F. Supp. 2d 671, 673 (E.D. Tex. 2004) (internal citations omitted). Under that standard, Defendants now identify those statements in which Plaintiff fails to support its opposition.

Because of the sheer number and general repetitiveness of Plaintiff's opposition, Defendants will not burden the Court with a reply to all 53 pages of Plaintiff's argument. However, at the hearing on this motion, Defendants are willing to discuss any particular statement, if any, which the Court believes Plaintiff has adequately refuted.

In its statement of evidentiary objections, Plaintiff makes numerous legal arguments that have no bearing on the material facts presented by Defendants. For example, Plaintiff has argued that certain statements are (i) not corroborated, (ii) inadmissible, (iii) not proper statements of fact, (iv) irrelevant, and/or (v) contain objectionable phrases (e.g., "Litle Processing Entity"). (*See* Pl.'s Objections.) These arguments have no bearing on the underlying facts, and as such should not be considered by this Court in determining whether or not there is a genuine issue of material fact. To the extent relevant, these arguments have been discussed in other documents, and as such these arguments will not be addressed again here. (*See* Defendants' Reply Brief in Support of its Motion for Partial Summary Judgment; Defendants' Response to Plaintiff's Evidentiary Objections, filed contemporaneously herewith.)

With respect to statements 5, 27, 34, 38, 40, and 49, Plaintiff has identified no evidence at all. As such, statements 5, 27, 34, 38, 40, and 49 should be deemed admitted for purposes of this motion on that basis alone. With respect to most of the remaining statements, Plaintiff identifies testimony ancillary or irrelevant to the statement offered, and submits that as contrary evidence or merely argues its own unilateral interpretation of the documents (which conflicts with the witness testimony and thus asks the Court to make improbable inferences).

For example, in responding to statement 7, Plaintiff cites testimony where the deponents state that they are unaware of other documents. A statement such as that has no bearing on the relevance or significance of the documents that have been produced. More importantly, this testimony does not contradict the significance of the documents presented by Defendants, which in the case of statement 7, conclusively establish that the Hanover Finance Program operated prior to July 7, 1996. For these reasons, those statements should also be deemed admitted for purposes of this motion because Plaintiff must not only identify evidence, but must identify evidence that controverts the stated fact and articulate the manner in which that evidence supports its claim. Plaintiff has done neither.

The one exception to the above is statement 29 (relevant only to dependent claims 4 and 13), where Plaintiff has cited arguably contrary evidence. However, this evidence is contradicted by the testimony of Plaintiff's own expert and by other witnesses and illustrated in Defendant's motion. (*See* D.E. 232, Ex. Q, ¶ 30[1]). The testimony cited by Plaintiff did not address whether the Litle Processing Entity had ever attempted to accept smart cards, and thus how difficult or easy such a task might have been. However, the Plaintiff's expert believes that it would have been simple. (Id. ¶ 30.) Therefore, the court must decide if the tangential evidence presented by Plaintiff is enough to contradict the testimony of other witnesses including Plaintiff's expert witness such that a fact-finder could rule in Plaintiff's favor on this issue.

As discussed above, the Plaintiff has opposed every single factual statement—even the most obvious undisputed facts (*see* Undisputed Fact 1). To the extent that Plaintiff has not identified evidence sufficient to rebut the facts presented by Defendants, Defendants respectfully request that the Court deem each fact admitted. "A party may not prevail in opposing a motion for summary judgment by simply overwhelming the district court with a miscellany of unorganized documentation." *Cash v. Conn Appliances, Inc.*, 2 F. Supp. 2d 884, 889 (E.D. Tex. 1997). Plaintiff refuses to narrow the issues for the Court and, as with Plaintiff's objections to Defendants' evidence and argument, attempts to overwhelm the Court and somehow prevent summary judgment of invalidity.

[1] The report of Plaintiff's expert was not available at the time the original motion was filed.